

Served: January 29, 1998



**UNITED STATES OF AMERICA  
DEPARTMENT OF TRANSPORTATION  
OFFICE OF THE SECRETARY  
WASHINGTON, D.C.**

Issued by the Department of Transportation  
on the 24<sup>th</sup> day of December, 1997

**1997 U.S.-CHILE COMBINATION  
SERVICE PROCEEDING**

**Docket OST-97-2586**

**FINAL ORDER**

**SUMMARY**

By this order, we make final our tentative decision in Order 97-11-27 to select Continental Airlines, Inc. to serve the U.S.-Chile market and to allocate it seven weekly frequencies for its nonstop services in the Newark/New York-Santiago market. We also make final our tentative decision to select Delta Air Lines, Inc., for backup authority in the U.S.-Chile market.

**BACKGROUND**

By Order 97-6-4, June 5, 1997, we instituted the *1997 U.S.-Chile Combination Service Proceeding*, Docket OST-97-2586, for the allocation of the seven additional frequencies available for U.S.-carrier services in the U.S.-Chile market effective December 15, 1997, and consolidated the frequency applications of Continental Airlines, Inc., and United Air Lines, Inc., and the certificate and frequency application of Delta Air Lines, Inc., into this proceeding. In that order we stated that in determining which carriers/gateways would be authorized, our principal objective would be to maximize the public benefits that would result from award of the authority in this case. In this regard, we stated that we would consider which applicants would offer and maintain the best service for the traveling and shipping public, and the effects of the applicants' service proposals on the overall market structure and level of competition in the U.S.-Chile market, and any other market shown to be relevant, in order to promote an air transportation environment that would sustain the greatest public benefits.

By Order 97-11-27, we tentatively determined that the selection of Continental most effectively satisfies the selection criteria in this case, and that Continental should be allocated seven weekly frequencies for its daily nonstop services in the Newark/New York-Santiago market. We also tentatively determined to award Delta backup authority should Continental not inaugurate and maintain services. Interested parties were directed to show cause why we should not make final the tentative decision in Order 97-11-27. Delta filed an objection to the tentative decision; Continental and the New Jersey Parties filed answers; and Delta and Continental filed further responsive pleadings.<sup>1</sup>

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<sup>1</sup> Delta and Continental accompanied their filings with motions for leave to file, which we will grant. United, the third applicant in this proceeding, did not file an objection to the Department's tentative decision.

## SUMMARY OF PLEADINGS

Delta states that it believes that the evidence of record establishes that Continental's two-aircraft Newark-Santiago nonstop service proposal would be uneconomic and, as a result, that there is a serious question as to whether Continental will default on its route case proposal, and that the Department failed to consider adequately the evidence that demonstrates Continental's proposal would not be viable. Delta further states that if the Department, nevertheless, decides to make final its tentative selection of Continental, it is important for the Department to impose certificate conditions on Continental's award that would trigger Delta's backup certificate authority should Continental fail to implement its two aircraft, evening departure, nonstop service proposal and operate all seven frequencies allocated for its services. Finally, Delta states that if the Department is prepared to allow Continental 120 days to implement service, Delta's backup authority should include the same 120-day startup condition rather than a 90-day startup condition as proposed in the show-cause order.

Continental states that although Delta has objected to the Department's order tentatively selecting Continental to provide nonstop Newark-Santiago service, Delta has not disputed the Department's principal finding in this case that Continental's Newark-Santiago service provides greater public benefits than Delta's circuitous one-stop service between Atlanta and Santiago. In addition, Continental argues that Delta's principal objections (questioning the economic viability of Continental's proposal) have already been considered and rejected by the Department, and that Delta's request for extraordinary backup authority provisions should be rejected in this proceeding, just as comparable Delta requests have been rejected in the past. Also, Continental questions whether Delta should be awarded backup authority since it would have to abandon certain Cincinnati-Brazil service to provide the U.S.-Chile service. Finally, Continental requests that it be given 120 days after receipt of its license in Chile before it is required to institute service.

The New Jersey Parties support Continental's position.

In its reply, Delta states that Continental's assertion that Delta plans to abandon its Cincinnati-Brazil service if its backup award for Chile service becomes effective is wrong and that the facts demonstrate that far from abandoning its *Brazil* case proposal, Delta intends to exceed that proposal. Also, Delta objects to Continental's request that it be allowed 120 days from the time the carrier receives foreign government authority to start service in the U.S.-Chile market. Delta argues that Continental should have raised this issue early on in the proceeding so that all parties to this case would have had an opportunity to address the legal and policy ramifications of such a startup condition, and that Continental has shown no basis for a special exception from the standard startup condition.

In its reply, Continental reiterates its arguments that activation of Delta's backup authority in this case would result in Delta's abandoning certain Cincinnati-Brazil service and that Continental should be allowed 120 days from receipt of authority from Chile to institute its nonstop Newark-Santiago service.

## DECISION

We have decided to make final, as modified in this order, our tentative decision in Order 97-11-27 to select Continental to serve the U.S.-Chile market and to allocate it seven weekly frequencies for its nonstop services in the Newark/New York-Santiago market. We will also make final our tentative decision to select Delta for backup authority in the U.S.-Chile market, with one slight modification as described below.

We have carefully considered the objections and comments to our tentative decision and conclude that no party has presented any new arguments or evidence that warrants a different result.

In our show-cause order, we noted that currently two U.S. carriers, American and United, serve the U.S.-Chile market from two U.S. gateways, Miami and Dallas/Ft. Worth, while four foreign-flag carriers serve the market from three U.S. gateways, Miami, Los Angeles, and New York.<sup>2</sup> Given the service and competitive situation in the market, we recognized that the ability to authorize an additional U.S. carrier with seven weekly frequencies affords us an important opportunity to increase U.S. carrier services, facilitating the continued growth of this market and enhancing the overall U.S.-carrier competitive presence.

After carefully reviewing the proposals of all of the applicants, we tentatively concluded that the selection of Continental provided the greatest public benefits. We specifically noted that Continental is the only applicant in this case proposing new nonstop service. Furthermore, it would provide the first nonstop service in the important Newark/New York-Chile market, which is the second largest U.S.-Chile market; that its proposed nonstop services would offer superior alternatives to the one-stop proposals offered by the other applicants in this proceeding; and that it would benefit the largest number of U.S.-Chile passengers.

No party has challenged these findings. Rather, Delta has reiterated arguments fully considered in our tentative decision, questioning the viability of Continental's proposed service and urging additional conditions on Continental's award to trigger Delta's backup award in this case. As we discussed in our show-cause order, we reviewed Continental's traffic forecasts and found them within the range of reasonableness. We also reviewed Delta's argument that Continental should have used U.S. International Air Travel Statistics (INS data) for determining foreign-flag carrier passengers in the New York-Chile market, rather than using DOT traffic data as Continental did, and we found Continental's methodology acceptable.<sup>3</sup> Delta has not presented any new evidence on this point in its objection. Therefore, we find no reason to alter our findings regarding Continental's traffic forecast.

Nor are we persuaded to impose additional conditions on Continental's authority. As indicated above, in tentatively selecting Continental, we clearly were persuaded essentially by its proposal to introduce nonstop service in the Newark-Santiago market and by the benefits that such nonstop service would offer the traveling and shipping public, not by the number of aircraft it proposed to operate or the specific departure times of its service. Continental has confirmed on the record of this case that it plans to institute the nonstop Newark-Santiago service it has proposed in this proceeding, and we fully expect that it will implement its services as proposed. However, we also recognize that airlines must adapt their services to market conditions, and in these circumstances we are not persuaded that Continental's authority should be restricted as Delta requests.<sup>4</sup> Should subsequent circumstances warrant reexamination of this issue, it is always in our discretion to do so.

## STARTUP CONDITIONS

In Order 97-11-27, we proposed to require Continental to inaugurate its U.S.-Chile service within 120 days of the service date of a final order in this case. Our standard startup condition begins on the date of service of the final order so that all affected parties have a date certain at the conclusion of a proceeding when that

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<sup>2</sup> U.S. carriers operate to Chile from gateways in Miami (American: two daily nonstop round trips; and United: one daily nonstop round trip and one daily one-stop round trip) and Dallas/Ft. Worth (American: one daily nonstop round trip). Foreign-flag carriers operate to three U.S. gateways--Miami (Lan Chile: one daily nonstop round trip, one nonstop round trip five days per week, and one two-stop round trip five days per week; and Aeroperu: one daily one-stop round trip), Los Angeles (Lan Chile: one daily one-stop round trip; LACSA: one daily three-stop round trip; and Mexicana: one two-stop round trip three days per week), and New York (Lan Chile: one daily one-stop round trip; and Aeroperu: one daily two-stop round trip).

<sup>3</sup> Order 97-11-27 at 7.

<sup>4</sup> See Order 97-4-13, *1997 U.S.-Brazil Combination Service Proceeding*, Docket OST-97-2016, at 10. See also Order 97-9-2 at 4-5.

startup period. We have decided not to grant Continental's late-filed request that its 120-day startup period begin when the carrier receives authority from the foreign government rather than the service date of the final order. Continental has presented no compelling reason why we should modify our standard startup provision in this case. In this regard, it has been our practice to consider granting an extension upon a timely-filled request when the reason for the delay is beyond the carrier's control.<sup>5</sup>

We are, however, persuaded by Delta's argument that we should impose a uniform startup condition on both carriers, and we note that Continental has no objection to such uniformity. Therefore, we have decided to modify the startup condition of Delta's backup certificate to require service to begin no later than 120 days after the certificate is activated, consistent with the startup condition on Continental's primary award.

## **BACKUP AWARD**

In Order 97-11-27, we tentatively decided to award Delta backup certificate authority to Continental's primary award and a backup allocation of seven weekly frequencies for service in the Atlanta-Sao Paulo-Santiago market. We are not persuaded by Continental's arguments that we should reconsider Delta's backup. In our tentative decision we found that Delta's proposed services in the U.S.-Chile market represented the next best alternative to Continental's proposed services. Those same factors still favor Delta's selection for a backup award, and Continental has presented no new evidence that warrants a different finding.

## **ACCORDINGLY,**

1. We make final, as modified by this order, our tentative findings and conclusions in Order 97-11-27;
2. We select Continental Airlines, Inc., for award of primary authority to engage in foreign scheduled air transportation of persons, property, and mail between Newark, New Jersey, and Santiago, Chile, and allocate it seven weekly frequencies to perform its authorized operations in the Newark-Chile market;<sup>6</sup>
3. We select Delta Air Lines, Inc., for backup authority and issue it a certificate of public convenience and necessity, in the form attached, and we allocate it seven weekly frequencies to perform its authorized operations in the Atlanta, Georgia-Sao Paulo, Brazil-Santiago, Chile market, should its backup certificate become activated;
4. We require Continental Airlines, Inc., to institute its proposed service in the U.S.-Chile market within 120 days of the service date of this order;<sup>7</sup>
5. The frequencies allocated here are awarded for a period of one year from the service date of this order and are subject to a 90-day dormancy condition wherein frequencies not used by a carrier for any 90-day period will automatically expire and revert to the Department for reallocation;<sup>8</sup>
6. We grant the motions of Delta Air Lines, Inc., and Continental Airlines, Inc., for leave to file otherwise unauthorized documents in Docket OST-97-2586;

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<sup>5</sup> See Order 96-10-2, *U.S.-Peru All-Cargo Service proceeding*, Docket OST-95-317, at 5.

<sup>6</sup> Continental holds permanent certificate authority on Route 29-F, Segment 3, to serve the U.S.-Chile market. Order 86-8-78.

<sup>7</sup> Delta's backup certificate requires it to inaugurate service within a similar 120-day period should its certificate become activated.

<sup>8</sup> The dormancy period will begin upon the selected carrier's inauguration of service.

7. We deny the application of United Air Lines, Inc., for allocation of frequencies in this proceeding;
8. Unless disapproved by the President of the United States under 49 U.S.C. 41307, this order and the attached certificate shall become effective on the 61st day after its submission for section 41307 review or upon the date of advice from the President or his designee under Executive Order 12597 and implementing regulations that the President does not intend to disapprove the Department's order under that section, whichever occurs earlier;<sup>9</sup>
9. To the extent not granted, we deny all outstanding requests in Docket OST-97-2586; and
10. We will serve this order on Continental Airlines, Inc.; Delta Air Lines, Inc.; United Air Lines, Inc.; the Georgia and Atlanta Parties; the New Jersey Parties; the Ambassador of Chile in Washington, D.C.; the Department of State (Office of Aviation Negotiations), and the Federal Aviation Administration (AFS-200).

By:

**PATRICK V. MURPHY**  
Deputy Assistant Secretary for  
Aviation and International Affairs

(SEAL)

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<sup>9</sup> This order was submitted for section 41307 on December 24, 1997. On January 23, 1998, we received notification that the President's designee under Executive Order 12597 and implementing regulations, did not intend to disapprove the Department's order.



**Experimental Certificate  
of Public Convenience and Necessity  
for  
Foreign Air Transportation  
(Backup Award)**

**Route 750**

**This Certifies That**

**Delta Air Lines, Inc.**

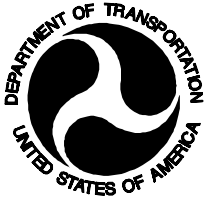
**is authorized, subject to the provisions of Subtitle VII of Title 49 of the United States Code, the orders, rules, and regulations issued thereunder, and the attached Terms, Conditions, and Limitations, to engage in foreign air transportation of persons, property, and mail.**

**This Certificate is not transferable without the approval of the Department of Transportation.**

**By Direction of the Secretary**

**Issued by Order 98-1-22  
On December 24, 1997  
Effective on (See attached)**

**Patrick V. Murphy  
Deputy Assistant Secretary for  
Aviation and International Affairs**



## Terms, Conditions, and Limitations

### **Delta Air Lines, Inc.**

is authorized to engage in foreign air transportation of persons, property, and mail:

Between Atlanta, Georgia, the intermediate point Sao Paulo, Brazil, and the terminal point Santiago, Chile.

This authority is subject to the following provisions:

(1) The holder shall at all times conduct its operations in accordance with the regulations prescribed by the Department of Transportation for the services authorized by this certificate, and with such other reasonable terms, conditions, and limitations as the Department of Transportation may prescribe in the public interest.

(2) The holder shall at all times conduct its operations in accordance with all treaties and agreements between the United States and other countries, and the exercise of the privileges granted by this certificate is subject to compliance with such treaties and agreements and with any orders of the Department of Transportation issued under them or for the purpose of requiring compliance with them. To the extent that the holder has authority to serve more than one country or points in more than one country on the same route segment, that authority does not confer upon the holder any additional rights (including fifth-freedom intermediate and/or beyond rights) in limited-entry markets unless the holder has been specifically designated to conduct such services and the Department has completed any necessary carrier selection procedures to determine which carrier(s) should be authorized to exercise such rights. In such cases, the fact that the carrier may hold authority to serve the countries (points) at issue on the same segment will not be considered as providing any preference to the holder in a carrier selection proceeding.

(3) The exercise of the authority granted here is subject to the holder's first obtaining from the appropriate foreign governments such operating rights as may be necessary.

(4) The holder's authority under this certificate is effective only to the extent that such operations are also authorized by the Federal Aviation Administration.

(5) The holder shall at all times remain a "Citizen of the United States" as required by 49 U.S.C. 40102(a)(15).

(6) The holder shall maintain in effect liability insurance coverage as required under 14 CFR Part 205. Failure to maintain such insurance coverage will render a certificate ineffective, and this or other failure to comply with the provisions of Subtitle VII of Title 49 of the United States Code or the Department's regulations shall be sufficient grounds to revoke this certificate.

(7) Should the holder propose any substantial changes in its ownership, management, or operations (as that term is defined in 14 CFR 204.2(n)), it must first comply with the requirements of 14 CFR 204.5.

(8) In the event that the holder ceases all operations for which it was found "fit, willing, and able," its authority under this certificate shall be suspended under the terms of 14 CFR 204.7 and the holder may neither recommence nor advertise such operations unless its fitness to do so has been redetermined by the Department. Moreover, if the holder does not resume operations within one year of its cessation, its authority shall be revoked for dormancy.

(9) The holder acknowledges that this certificate is granted to determine if the holder's projected services, efficiencies, methods, rates, fares, charges, and other projected results will, in fact, materialize and remain for a sustained period of time, and to determine whether the holder will provide the innovative or low-priced air transportation it proposed in its application for this authority.

(10) The holder may combine services on this certificate with all services authorized by other Department of Transportation certificates or exemptions, provided, that such operations are consistent with applicable international agreements; and provided further, that (a) nothing in the award of the route integration authority requested should be construed as conferring upon the holder additional rights (including fifth freedom intermediate and/or beyond rights) to serve markets where U.S. carrier entry is limited unless the holder first notifies us of its intent to serve such a market and unless and until the Department has completed any necessary carrier selection procedures to determine which carrier(s) should be authorized to exercise such rights; and (b) should there be a request by any carrier to use the limited entry route rights that are included in the holder's authority by virtue of the route integration authority granted here, but not being used, the holding of such authority by route integration will not be considered as providing any preference for the holder in a competitive carrier selection proceeding to determine which carrier(s) should be entitled to use the authority at issue.



Issued by  
Order 98-1-22  
Route 750

(11) Exercise of the privileges granted by this certificate is subject to any other reasonable terms, conditions, and limitations that the Department of Transportation may prescribe in the public interest.

This certificate shall not become effective until either (1) Continental notifies the Department that it is not using all of the frequencies allocated to it in this proceeding and relinquishes those frequencies to the Department for reallocation, or (2) such frequencies become dormant and automatically revert to the Department under the dormancy conditions imposed on the frequency allocation, in which case the dormant frequencies, upon request and further order of the Department, will be allocated to Delta for Atlanta-Sao Paulo-Santiago services; and it shall expire January 29, 1999; provided, however, that if this authority becomes effective before that date, it shall not expire until January 29, 2003 unless the holder fails to inaugurate service within 120 days of that effective date, in which case, this certificate will expire on the 121st day.